

This Opinion is Not a
Precedent of the TTAB

Mailed: March 2, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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*In re Lyte Up Clothing*¹
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Serial No. 90104580
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Andrew P. Connors and Jacob P. East of Darkhorse Law PLLC,
for Lyte Up Clothing.

G. Iñaki Liñero Guarda, Trademark Examining Attorney, Law Office 127,²
Mark Pilaro, Managing Attorney.

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Before Goodman, Dunn and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Lyte Up Clothing (“Applicant”) seeks registration on the Supplemental Register of the standard character mark LYTE UP CLOTHING (“Clothing” disclaimed) for “Hats; Suspenders; Bow ties; Halloween costumes; Halloween costumes and masks

¹ While Applicant’s appeal and reply briefs identify Applicant as “Lyte Up Clothing LLC,” the Application identifies Applicant as “Lyte Up Clothing.” Corrections to an applicant’s name require a sworn statement. *See* Trademark Rule 2.71(d), 37 C.F.R. § 2.71(d); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1201.0102(c) (July 2022).

² During prosecution of the Application now on appeal, the Trademark Examining Attorney was Joseph P. McCarthy.

sold in connection therewith; Headbands; Sweatshirts; Head wraps; Hooded sweatshirts; Ties as clothing; Tops as clothing” in International Class 25.³

The Trademark Examining Attorney refused registration under Trademark Act Sections 23(c) and 45, 15 U.S.C. §§ 1091(c) and 1127, on the ground that Applicant’s proposed mark, as applied to the goods identified in the Application, is generic and thus incapable of distinguishing Applicant’s goods from the goods of others.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. The appeal is fully briefed.⁴ We affirm the refusal to register.

I. Evidentiary Issues

Before proceeding to the merits of the refusal, we address some evidentiary matters. Applicant attached to its brief screen captures from its website,⁵ which are copies of the same web pages it made of record during prosecution.⁶ The Board discourages this practice. *In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1315 (TTAB 2011); *In re SL&E Training Stable Inc.*, 88 USPQ2d 1216, 1220 n.9 (TTAB 2008) (attaching as exhibits to brief material already of record requires Board to determine

³ Application Serial No. 90104580 was filed on August 10, 2020, under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use of the mark anywhere and first use in commerce since at least as early as June 14, 2018. Originally filed seeking registration of the proposed mark on the Principal Register, the Application was amended to the Supplemental Register on April 14, 2021.

⁴ Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the TSDR Case Viewer. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

⁵ Applicant’s Brief, 5 TTABVUE 10-14.

⁶ Office Action Response of November 16, 2021, at TSDR 11-15.

whether attachments had been properly made of record and adds to the bulk of the file); *In re Thor Tech Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007) (attaching evidence from record to briefs is duplicative and is unnecessary). We consider only the pages from Applicant's website that were made of record during prosecution.

By way of an embedded URL and a listing of the Internet view date within its brief, Applicant provides a definition of the noun-combining form "-LYTE" from MERRIAM-WEBSTER online.⁷ The Examining Attorney objects to Applicant's introduction of the dictionary definition of "-LYTE" in this matter, on the grounds that this evidence was submitted untimely and improperly (that is, without providing the actual MERRIAM-WEBSTER web page on which the definition appeared). Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *In re ADCO Indus. – Techs., L.P.*, 2020 USPQ2d 53786, at *2 (TTAB 2020).

Nonetheless, we take judicial notice that the term "-LYTE" is defined as "(noun combining form) [a] substance capable of undergoing (such) decomposition (e.g., electrolyte)".⁸ The Board may take judicial notice of dictionary definitions from online sources when the definitions themselves are derived from dictionaries, such as MERRIAM-WEBSTER, which exist in printed form or have regular fixed editions. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

⁷ Applicant's Brief, 5 TTABVUE 6.

⁸ Definition of "-LYTE" from MERRIAM-WEBSTER online (<https://www.merriam-webster.com/dictionary/-lyte>, last accessed March 2, 2023).

II. Applicable Law: Generic Terms

A mark proposed for registration on the Supplemental Register must be capable of distinguishing the applicant's goods or services. Trademark Act Section 23(c), 15 U.S.C. § 1091(c). "Generic terms do not so qualify." *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017).

"A generic name—the name of a class of products or services—is ineligible for federal trademark registration." *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2020 USPQ2d 10729, at *2 (2020). "[A] term [also] is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, [or refers to a key aspect of that genus,] even if the public does not understand the term to refer to the broad genus as a whole." *Royal Crown Co., Inc. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046-47 (quoting *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1638 (Fed. Cir. 2016) ("the term 'pizzeria' would be generic for restaurant services, even though the public understands the term to refer to a particular sub-group or type of restaurant rather than to all restaurants")).

In other words, "[a] generic term, by definition, identifies a type of product, not a particular source." *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1011 (Fed. Cir. 1987). If a term is generic for one or more of the goods or services listed in an application, it is treated as being generic for an entire class for which registration is sought. *See In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

To establish a prima facie case that a proposed mark is generic, for the purpose of refusing registration on the Principal or Supplemental Register, there must be

sufficient evidence to support a “reasonable predicate” (i.e., reasonable basis) for finding the mark generic under the applicable legal standard. *See generally In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003) (“[T]o meet its prima facie burden, the PTO must, at a minimum, set forth a ‘reasonable predicate’ for its position of no inherent distinctiveness”) (citation omitted); *In re Loew’s Theatres, Inc.*, 769 F.2d 764, 768, 226 USPQ 865, 868 (Fed. Cir. 1985). Once a prima facie case for a refusal is made, it must be rebutted by “competent evidence,” which requires “proof by preponderant evidence.” *See, e.g., In re Becton, Dickinson & Co.*, 675 F.3d 1368, 1374, 102 USPQ2d 1372, 1376-77 (Fed. Cir. 2012).

Whether a particular term is generic is a question of fact. *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009). Resolution of that question depends on the primary significance of the term to the relevant public. “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)).

The genericness inquiry is a two-part test: “First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (quoting *Marvin Ginn*, 228 USPQ at 530).

“Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987)); *see also In re Cordua Rests.*, 118 USPQ2d at 1634; *Princeton Vanguard*, 114 USPQ2d at 1830; *In re Reed Elsevier*, 82 USPQ2d at 1380 (finding third-party websites competent sources for determining what the relevant public understands mark to mean). An applicant’s own website and marketing material is also probative and can be “the most damaging evidence” in showing how the relevant public perceives a term. *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1957-58 (TTAB 2018) (citing *Princeton Vanguard*, 114 USPQ2d at 1831; *In re Gould Paper Corp.*, 5 USPQ2d at 1112). Competitor use also is probative on the issue of genericness. *Booking.com B.V.*, 2020 USPQ2d 10729, at *7 n.6 (evidence of genericness “can include ... usage by ... competitors”).

III. The Evidence made of Record

We now review the prosecution record to summarize the evidence submitted on the question of genericness.

A. Dictionary Definitions

The Examining Attorney made of record the following definitions of “LIGHT UP”:

1. to make or become light
2. to make or become bright, cheerful, etc.
3. Informal: to begin smoking (a cigar, etc.)⁹

⁹ Definition of “LIGHT UP” from COLLINS dictionary (American English definition), Office Action of December 11, 2020, at TSDR 4.

As discussed above, we take judicial notice of the definition of “-LYTE” (noun combining form) as meaning a “substance capable of undergoing (such) decomposition” (e.g., electrolyte). This definition is of no assistance to Applicant, however, considering the mark includes the separate term LYTE, and not -LYTE used as a combining form for a noun. We also note Applicant’s statement in its reply brief that “Applicant does not claim use of the word in this manner”¹⁰

B. Website Evidence

We summarize below the Internet evidence the Examining Attorney and Applicant made of record showing how “light up” is used in connection with clothing goods and costume items:

- Applicant’s website – under the heading “Lyte Up Your Party” displaying Applicant’s clothing goods under names such as “light up bride/groom cowboy hat,” “light up bow tie (in various colors),” “light up necktie (in various colors),” “light up mustache bandana,” “light up flower headband (in various color combinations),” and “light up suspenders (in various colors),” among other goods that light up [Office Action of May 17, 2021, at TSDR 6-10; Office Action Response of November 16, 2021, at TSDR 11-15].
- Amazon.com webpage – displaying the following goods under the category “light up clothing”: leg wraps, face masks, hats, ties, bow ties, vests, jackets, suspenders, leg warmers, t-shirts, skirts, scarves, boas, hoodies, and footwear, all having its main feature being that they illuminate, light up or glow in the dark [Office Action of May 17, 2021, at TSDR 11-15].
- Etsy webpage – display of the following clothing goods under the category “light up clothing”: skirts, daisy pasties, windbreakers, vests, jackets, skirts, crop tank, costumes, dresses, hoodies, hats, and bikinis that illuminate, light up or glow in the dark [Office Action of May 17, 2021, at TSDR 16-17].
- TrYptiX Fashion website – describing its product as “Light Up Fiber Optic Clothing,” which indicates that it is light up clothing with fiberoptic material, and displaying the following clothing items that illuminate, light up or glow in the dark: face masks, jackets, vests, sundresses, wedding dresses, pants, and ties. The website further advertises that TrYptiX specializes “in light up

¹⁰ Applicant’s Reply Brief, 8 TTABVUE 3.

clothing, from ... [TrYptiX's] ever popular LED light up fluffies and LED light up cosplay tails anchoring ... [TrYptiX's] light up costume options to ... [TrYptiX's] growing in popularity line of fiber optic dresses, suits, hoodies, vests, skirts, and tops Everyone will notice as you shine in ... [TrYptiX's] truly fantastic LED light up clothing, because you will literally be lighting up the room" [Office Action of May 17, 2021, at TSDR 18-20].

- YMYW Your Mind Your World website – advertising its “Light Up Collection,” consisting of “high-tech fiber optic light up clothing,” such as hoodies, dresses, trench coats, jackets, and t-shirts that all light up [Office Action of May 17, 2021, at TSDR pp. 21-23].
- Extreme Glow webpage – displaying clothing goods while utilizing “light up” to describe the main characteristic of the following goods: suspenders that light up, scarves that light up, beanies that light up, headbands that light up, and costume masks that light up. The website also advertises about its “LED light up novelty stuff ... ” [Office Action of May 17, 2021, at TSDR 24-27].
- Pinterest webpage – where “light up clothing” is used to identify the category of clothing with its central feature being glowing or lighting up, and demonstrating numerous photographs of clothing items that light up [Office Action of May 17, 2021, at TSDR 28-24].
- This Is Why I’m Broke website – utilizing “Light Up Apparel” to identify the glowing and illuminating characteristic of the entity’s apparel goods, such as, bras, scarves, shoes, ties, costumes, hoodies, jackets, and hats, among other goods [Office Action of May 17, 2021, at TSDR 35-39].
- Fashion Statement website – advertising its goods by stating, “make your own custom light up products,” with photographs of t-shirts drawstring bags, and bracelets that light up in the dark [Office Action of May 17, 2021, at TSDR 40-45].
- Glow City website – using “light up” in its advertisement of its clothing that glow in the dark, such as, “light up suit jackets,” “light up fedora hat,” and “light up tie.” [Office Action of May 17, 2021, at TSDR 46-47].
- Flashing Blinky Lights website – using “light-up products” when identifying hats, masks, boas, suspenders, leg warmers, bowties and headbands that glow in the dark [Office Action of May 17, 2021, at TSDR 48-55].
- Kohl’s website – display using “light-up Christmas blazer & tie set” to indicate that the main characteristic of the blazer and tie set is that it illuminates [Office Action of December 9, 2021, at TSDR 5].
- Google Shopping webpage – using “light-up hoodie” to indicate that a hoodie by Kryptonite Kollektibles has tiny lights that light-up [Office Action of December 9, 2021, at TSDR 6].

- Gavin Scott webpage – using the term “light up hoodie” to indicate that the advertised hoodie has the main characteristic of being able to illuminate or light up [Office Action of December 9, 2021, at TSDR 8-11].
- Unspoken Fashion’s webpage – using “light up faux fur pants” to advertise that the faux fur pants can light up in the dark [Office Action of December 9, 2021, at TSDR 12].

IV. Applicant’s Concessions

During the briefing of this Appeal, Applicant made the following concessions:¹¹

- “[A]pplicant concedes that the word ‘clothing’ alone describes the genus of some of the goods she sells ... [and] does not dispute that the genus of goods at issue is clothing”¹²
- “Applicant does not dispute that the genus of goods at issue is clothing”¹³
- “[T]he applied-for mark [LYTE UP CLOTHING] clearly describes the purpose of the goods: the illumination of clothing. The applied-for mark conveys to a consumer the purpose of the goods before a consumer has to personally interact with the item.”¹⁴
- “‘Lyte Up Clothing’ refers to the fact that Applicant only sells clothing items which possess battery-powered, illuminating designs. The illuminating features of these goods are ornamental designs and are a distinguishing characteristic of Applicant’s products.”¹⁵

¹¹ The Board considers the concessions made by an applicant in its brief. *In re Southland Corp., of Dallas, TX*, 162 USPQ 465, 466 (TTAB 1969) (“Since applicant has conceded that ‘MIDWEST’ is primarily geographically descriptive and we agree therewith, we cannot perceive how the addition of the word ‘farms’, or words of similar import, such as ‘dairies’, would be sufficient to overcome the examiner’s refusal to register”); *In re Initial Teaching Alphabet Pubs., Inc.*, 153 USPQ 684, 685 n.2 (TTAB 1967) (Noting “applicant’s admission” in its reply brief on appeal, “that the letters [‘i.t.a.’ within applicant’s proposed mark] are in the public domain as applied to books or materials dealing with the initial teaching alphabet.”); *In re Glen Raven Knitting Mills, Inc.*, 153 USPQ 134, 134 (TTAB 1967) (“in its brief on appeal applicant concedes that ‘BUONARROTI’ is in fact a surname and, so far as can be ascertained herein, it would have no other significance to purchasers ... it is our opinion that the refusal of registration was eminently correct”).

¹² Applicant’s Brief, 5 TTABVUE 4.

¹³ Applicant’s Brief, 5 TTABVUE 4.

¹⁴ Applicant’s Brief, 5 TTABVUE 7.

¹⁵ Applicant’s Reply Brief, 8 TTABVUE 5.

- “With Applicant’s mark, the relevant consumer knows that they are not only able to purchase clothing but items, including clothing, which may be illuminated, a defining characteristic of Applicant’s goods.”¹⁶

V. Discussion and Analysis

Having reviewed and summarized the evidence made of record, as well as Applicant’s concessions, we consider whether LYTE UP CLOTHING is generic as applied to Applicant’s clothing goods of interest under the two-part test of *Marvin Ginn*, 228 USPQ at 530.

A. The Genus of Applicant’s Goods

The genus of the goods may be defined by an applicant’s identification of goods. *See In re Cordua Rests.*, 118 USPQ2d at 1636 (citing *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991). An applicant’s website may assist in clarifying or refining the genus by providing the context for the terms in its identification goods. *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007).

As confirmed by Applicant’s above-noted concessions: (i) the genus of Applicant’s goods as identified in its Application are clothing items, and (ii) as shown on its website a key aspect of Applicant’s clothing items and costumes is that they illuminate or “light up.”

¹⁶ Applicant’s Reply Brief, 8 TTABVUE 6.

B. Whether the Relevant Public Understands LYTE UP CLOTHING Primarily to Refer to the Genus of Applicant's Goods

1. Defining the Relevant Public

In the context of our genericness inquiry, the relevant public is the “actual or potential purchasers of the goods.” *Loglan Inst. Inc. v. Logical Language Grp., Inc.*, 962 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992) (quoting *Magic Wand*, 19 USPQ2d at 1553). Here, because there are no restrictions on or limitations to the channels of trade or classes of consumers in the Application on appeal, the relevant public comprises ordinary consumers who purchase or would purchase Applicant's goods. Applicant does not argue to the contrary.

2. The Understanding of the Relevant Public when Exposed to LYTE UP CLOTHING with reference to Applicant's Goods

To determine the public's understanding of a proposed mark, it must be considered as a whole. *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009) (citing *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cri. 2005)). Nevertheless, a compound term comprising generic elements is itself generic “if the combination yields no additional meaning to consumers capable of distinguishing the goods or services.” *Booking.com B.V.*, 2020 USPQ2d 10729, at *7 (emphasis omitted). Thus, if each of the constituent words in a proposed mark is generic, the combination is generic when the entire formulation does not add any meaning to the otherwise generic designation. *Princeton Vanguard, LLC*, 114 USPQ2d at 1831 (citing *In re Steelbuilding.com*, 75 USPQ2d at 1421).

As noted, in its brief Applicant concedes that the word “clothing” describes the genus of some of the goods she sells, and does not dispute that the genus of goods at

issue is clothing.”¹⁷ Moreover, by its disclaimer of “CLOTHING” in the Application seeking a Supplemental Register registration, “[A]pplicant has admitted that ... [this term] does not serve to identify the source of the goods.” *In re Burlington Indus., Inc.*, 196 USPQ 718, 719 (TTAB 1977); *see also In re Consumer Protection Firm PLLC*, 2021 USPQ2d 238, at *23 (TTAB 2021) (“Applicant disclaimed FIRM.COM on the Supplemental Register and therefore has conceded it is generic.”).

Apart from Applicant’s concessions, “CLOTHING” is defined as “items (as of cloth) designed to be worn to cover the body[,]”¹⁸ We further note that this term appears in Applicant’s identification of goods: “Ties as clothing; Tops as clothing,” and such use by Applicant is evidence of genericness. *In re Johanna Farms, Inc.*, 222 USPQ 607, 609 (TTAB 1984) (“The term ‘yogurt’ is concededly the name of the goods. That fact is incontrovertible where, as here, the same term has been used in the identification of goods for which registration is sought.”).

This leaves us to consider the “LYTE UP” portion of Applicant’s proposed mark. A novel spelling or an intentional misspelling that is the phonetic equivalent of a generic term also is generic if purchasers would perceive the different spelling as the equivalent of the generic term. *See, e.g., Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (CUSH-N-GRIP found generic for cushioned tool handles); *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1631 (TTAB 1998)

¹⁷ Applicant’s Brief, 5 TTABVUE 4.

¹⁸ We take judicial notice of the dictionary definition of “CLOTHING” from MERRIAM-WEBSTER (<https://www.merriam-webster.com/dictionary/clothing>, last viewed March 2, 2023).

(MASSFLO found generic for mass flowmeters); *In re ING Direct Bancorp*, 100 USPQ2d 1681, 1690 (TTAB 2011) (PERSON2PERSON PAYMENT found generic for direct electronic funds transfers including electronic payment services between individuals).

Applicant's proposed mark includes a misspelling of the word "light" as "LYTE." The letters "i" in "light" and "y" in "LYTE" produce the same sound, while the letters "gh" in "light" and the letter "e" in "LYTE" are silent. Consumers thus will immediately understand the phrase "LYTE UP" to mean "light up." The Examining Attorney, as we noted above, made of record the definition of "light up" from COLLINS Dictionary (American English definition) as meaning "to illuminate or cause to illuminate."

The name of a key aspect, a central focus or feature, or a main characteristic of goods may be generic for those goods. *In re Cordua Rests., Inc.*, 118 USPQ2d at 1637-38; *In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, at *13 (TTAB 2019). Any term that the relevant public understands to refer to the genus can be generic. *Royal Crown Co.*, 127 USPQ2d at 1046 (citing *In re Cordua Rests.*, 118 USPQ2d at 1637). From the evidence made of record, including the COLLINS Dictionary definition of "light up," Applicant's website, as well as numerous third-party websites, "light up" (including the intentionally mis-spelled "LYTE UP") immediately and directly informs the public that the goods being offered for sale are clothing goods or costumes that illuminate or glow in the dark (that is, they "light up"). The combination of "LYTE UP" and "CLOTHING" does not yield any additional meaning to consumers

that would make it capable of distinguishing Applicant's goods from like goods of others. The Examining Attorney has made a prima facie case for the refusal to register Applicant's proposed mark on the ground that it is generic, which Applicant has not rebutted. We therefore find that LYTE UP CLOTHING is generic for Applicant's identified goods.

Decision:

The refusal to register Applicant's proposed mark LYTE UP CLOTHING on the ground that is generic for Applicant's goods, in derogation of Trademark Act Sections 23(c) and 45, is affirmed.